APPENDIX.

In the District Court of the United States,
For the Middle District of Pennsylvania.

No. 160.

Habeas Corpus.

United States of America, ex rel. Theodore Roosevelt Potts,

v.

Robert W. Rabb, U. S. Marshal, Middle District of Pennsylvania.

OPINION.

October 20, 1943, Theodore Roosevelt Potts and others were indicted (No. 10984 October Term, 1943) and, in the indictment were charged with violation of the laws of the United States. November 15, 1943, Potts and the other defendants were detained in the custody of the marshal pursuant to processes of this court issued upon the indictment referred to. On the same day all of the Defendants were called for arraignment. They appeared in the court room before the Judge, and counsel for each defendant presented a petition for a writ of Habeas Corpus. On the same day after hearing in open court and, upon due consideration, the prayers of the petitions were denied. The petition of Potts, which is in the only case I shall discuss in this opinion, alleges that he is illegally in the custody of the United States Marshal for this district, because there are two indictments pending against him charging the same offense involving the same facts and evidence, and that he is, therefore, unlawfully restrained upon a charge for which he has

been previously indicted, and which said previous indictment has not "been discharged, quashed, or withdrawn". The Petitioner has not yet gone to trial under either indictment, and the present petition for Habeas Corpus is in advance of trial. On November 20, 1943 a Nolle Prosequi was entered as to the first or previous indictment (No. 10,787 December Term, 1942). Therefore, the question as to whether the Petitioner is entitled to a writ of Habeas Corpus for the reason set forth in the petition and above referred to is moot. However, in my opinion, the reason is entirely without merit. Kastel v. U. S. (CCA. 2) 30 Fed. (2d) 687, and cases there cited.

It is further alleged in the petition that no witnesses testified, nor could any witness testify before the Grand Jury which returned the second indictment who could legally give competent evidence of the charge set forth in the said indictment. This is clearly an attempt to test the legal sufficiency of the indictment by collateral proceedings. The Supreme Court has definitely pointed out that such proceedings are improper. Glasgow v. Moyer, 225 U. S. 420, 429. If it were permissible for defendants to test the validity of indictments by proceedings of this character the result would be intolerable confusion in the administration of justice, and such was not the intention of Congress when it vested the courts with power to issue writs of Habeas Corpus. Ex parte, Finn, 16 Fed. Supp. 1.

It appears from the petition itself that the Petitioner was not entitled to a writ of Habeas Corpus, and the prayer of the petition was, therefore, denied.

Scranton, Pa.

Dec. 3, 1943.

/s) Albert L. Watson,
United States District Judge.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 8543. October Term, 1943.

UNITED STATES OF AMERICA, ex rel. THEODORE ROOSEVELT POTTS,

Appellant,

v.

ROBERT W. RABB, U. S. Marshal, Middle District of Pennsylvania.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Before BIGGS, JONES and GOODRICH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed February 14, 1944.)

By BIGGS, *Circuit Judge.*

The appeal at bar, stripped to its essentials, requires us to decide the question of whether an individual, arrested upon a bench warrant issued under an indictment, may test by writ of habeas corpus the sufficiency of the evidence before the grand jury which returned the indictment.

The indictment charges the appellant with a conspiracy to defraud the United States in connection with the

construction of a naval depot at Mechanicsburg, Pennsylvania. It was returned by a duly constituted grand jury of the District Court of the United States for the Middle District of Pennsylvania. After its return the appellant was advised by the United States Attorney to appear in court on November 15, 1943 for arraignment. When the appellant came into court his counsel filed a petition for a writ of habeas corpus. The court decided that the appellant was not entitled to the writ because he was not in custody. The United States Attorney then asked for and received a bench warrant for the arrest of the appellant. He was arrested in the courtroom by the United States Marshal. His counsel immediately filed a second petition for a writ of habeas corpus.

The appellant's second petition asserfed (as did his first) that no witness testified before the grand jury who could or did give legally competent evidence against him. He contends, therefore, that the bench warrant was issued without probable cause and in derogation of his rights under the Fourth Amendment to the Constitution of the United States.[1] The court again refused to issue the writ.[2] About two hours later the court admitted the appellant to bail which he immediately made. A few days later the appellant filed a motion to quash the indictment,[3] the grounds of the motion being those stated in his petitions for habeas corpus.

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[1] The history and development of the Fourth Amendment show that it guarantees the right of the individual to be secure in his person against unreasonable arrests, as well as against unreasonable searches of houses and seizure of papers and effects. See "The History and Development of the Fourth Amendment to the United States Constitution", Lasson, Series LV No. 2 of the Johns Hopkins University Studies in Historical and Political Science, 1937, and in particular pp. 35, 95, 117 and 132 and the authorities and notes cited therein.

[2] The court in its opinion dated December 3, 1043 gave the reasons for its refusal, stating, *inter alia*, "If it were permissible for defendants to test the validity of indictments by proceedings of this character the result would be intolerable confusion in the administration of justice, and such was not the intention of Congress when it vested the courts with power to issue writs of Habeas Corpus. Ex parte, Finn, 16 F. Supp. 1."
This decision has not been reported.

[3] This has been made part of the record before us.

The appellant in effect argues that because there was a short period of time following his arrest on the afternoon of November 15, 1943 in which he was in the custody of the United States Marshal he is entitled to prosecute this appeal despite the fact that he was admitted to bail a little later upon the afternoon of that very day. We cannot agree. The appeal at bar is moot. It was moot even when the notice of appeal was filed on November 29, 1943.

The writ of habeas corpus is one of the great writs upon which the liberty of the individual depends. Its grant cannot be permitted to turn upon an academic question of whether at a given instant in time an individual was within the custody of a United States marshal when in fact he was enlarged on bail a few hours later. Indeed, if we were to reverse the order of the court below and direct it to grant the writ, our mandate would be a nullity for the appellant is not presently deprived or restrained of his liberty. See the actual wording of R.S. § 754, 28 U.S.C.A. 454.[1] Cf. the facts of Ex parte Catanzaro, 138 F. (2nd) 100, 101 (CCA 3).

But quite aside from the foregoing, the learned District Judge committed no error in denying the petition for the writ. The courts of the United States have held almost without exception that the writ of habeas corpus will not lie to question the sufficiency of an indictment which on its face is within the jurisdiction of the court to which it was returned and that the writ of habeas corpus will not serve as a writ of error. Knewel, Sheriff, v. Egan, 268 U. S. 442; Frank v. Mangum, 237 U. S. 309; Valentina v. Mercer, 201 U. S. 131; Horner v. United States, 143 U. S. 570; ex parte Mason, 105 U. S. 696; ex parte Carll, 106 U. S. 521; In re Frederich, 149 U. S. 70, 75. The court below had jurisdiction of the appellant and of the offense with which he is

[1] R. S. Sec. 754 provides in part: "Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known."

charged. As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion. See In re Lancaster, 137 U. S. 393, 395; Brady v. United States, 24 F. (2nd) 405, 407-408; Nanfito v. United States, 20 F. (2nd) 377, 378; United States v. Rubin, 218 F. 245, 247-250.

The appeal is dismissed as moot.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 10984. October Term, 1943.

UNITED STATES OF AMERICA,
Plaintiff,

v.

THEODORE ROOSEVELT POTTS,
Defendant.

OPINION.

On the petition of Theodore Roosevelt Potts, to whom I shall refer as "the Petitioner", a rule was granted upon Frederick v. Follmer, United States Attorney for the Middle District of Pennsylvania to show cause why he should not give to Theodore Roosevelt Potts and his attorney, Walter Biddle Saul, the names of the witnesses who testified before the Grand Jury which returned the Indictment No. 10,984 October Term 1943.

The Petitioner first attacked the indictment by filing a petition for a writ of Habeas Corpus, alleging that he had been arrested upon a warrant issued without probable cause and praying for protection of the provisions of the Fourth Amendment of the Constitution of the United States. This Court refused to grant the writ and was sustained in its refusal on appeal, by the Circuit Court of Appeals, United States of America, Ex rel. Theodore Roosevelt Potts v. Robert W. Rabb, 141 F. (2d) 45.

In its opinion, the Circuit Court of Appeals stated: "As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for Habeas Corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which

returned the indictment, that fact can be ascertained on the hearing of the motion."

Thereafter, a hearing was held on petition and rule on Robert W. Babb, United States Marshal for the Middle District of Pennsylvania, to show cause why the names of the witnesses who appeared and testified before the Grand Jury identified above should not be disclosed to the Petitioner. That rule was discharged and the petition dismissed.

Petitioner now attempts to obtain the names of the Grand Jury witnesses from the United States Attorney. He contends, first that the decision of the Circuit Court of Appeals above quoted must be adhered to closely as "the law of the case." This is undoubtedly true, but I differ with the Petitioner as to what that opinion holds and as to that which was intended by the Circuit Court of Appeals.

Petitioner contends that when the Circuit Court of Appeals informed him that he had the right to prove the fact that there was no competent evidence before the Grand Jury, it intended that he should be furnished with the names of those who testified before the Grand Jury in the absence of any allegation or showing that there was some irregularity on the part of the witnesses before the Grand Jury. Surely it cannot be seriously contended that the Circuit Court of Appeals, by pointing out the proper method of procedure for Petitioner, intended to overrule all prior settled law on the question here involved. The Circuit Court of Appeals merely meant that Petitioner had the right to show irregularity by some legally competent evidence of his own and not by some breach of precedent.

The general rule is that ~~the Defendant~~ is not entitled as a matter of law to a list of the names of the witnesses who appeared before the Grand Jury. There is no provision in the law requiring the United States Attorney to furnish the Defendant with the names of those who testified before the Grand Jury. But, on the contrary, there is a regulation promulgated by the Attorney General May 22,

1939, pursuant to authority vested in him by statute, 5 U. S. C. A. 22, making all official records in the office of the United States Attorney confidential, and requiring the United States Attorney to refuse to produce such records on request. This regulation has the force of law, and the Court has no jurisdiction or power to punish an officer for conforming to that law." Ex Parte Sackett, 74 Fed. (2d) 922. In United States v. Carson, 291 F. 646, a request similar to the one made here was refused. Judge Learned Hand made this statement: "No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

Petitioner contends that in certain cases a situation might arise, in which circumstances and evidence would compel the Court in fairness to the accused to enter into an investigation of the Grand Jury proceedings to determine its actions, the testimony taken before it, and the witnesses giving that testimony. It is true that a situation might arise pressing the Court to such an investigation of the Grand Jury's activities, but that should take place only on a showing by the Petitioner of sufficient reason on which the Court might base its belief that irregularities had occurred. In the case at bar, Petitioner has continuously made apparent his total lack of knowledge of any circumstances which would cast any doubt upon the propriety of the proceedings before the Grand Jury. It would be presumptuous of this Court to demand that the names of the witnesses be made known to the Defendant in conflict with all prior precedent on no less provocation than that the Petitioner states that he is innocent and, therefore, he should have the names of the witnesses who testified before

the Grand Jury, in order that he may have an opportunity to show "whether or not there was any legally competent evidence before the Grand Jury."

Now, October 4, 1944, the rule to show cause is discharged, and the petition is dismissed.

ALBERT L. WATSON,
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 10984. October Term, 1943.

United States of America,

Plaintiff,

v.

Theodore Roosevelt Potts,

Defendant.

OPINION.

This matter is before the Court upon motion of the Defendant to quash the indictment and the motion of Government to strike off Defendant's motion and answer.

The motion to quash as filed sets forth various grounds but at hearing thereon, counsel for the Defendant withdrew all grounds except the ground that there was no competent evidence before the Grand Jury that would justify the returning of an indictment against the Defendant.

At the hearing on the motion to quash, the Defendant sought, by calling the United States Attorney to the stand, to ascertain the names of the witnesses examined by the Grand Jury and offered to prove by subsequent testimony that the witnesses examined could not have produced any competent evidence to justify Defendant's indictment. Counsel for the Government objected to the examination of the United States Attorney as to the names of the witnesses appearing before the Grand Jury and this objection was sustained. Thereupon, counsel for the Defendant introduced letters exchanged between himself and the United States Attorney in which the latter refused, upon request, to furnish Defendant with the names of the witnesses who appeared before the Grand Jury and then rested.

This being the state of the record, it is obvious that Defendant has produced no evidence to support his motion to quash and the same must be dismissed.

Although there is undoubtedly considerable merit in the reasons relied upon by the Government in its motion to strike, in view of the conclusion reached with reference to the motion to quash, it is unnecessary to pass upon the questions raised by the Government's motion to strike.

Now, October 4, 1944, the motion of the Defendant to quash the indictment is denied.

(s) ALBERT L. WATSON,
United States District Judge.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 8543. October Term, 1943.

UNITED STATES EX REL. THEODORE ROOSEVELT POTTS,

Appellant,

v.

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

PETITION FOR MANDATE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Before GOODRICH and MCLAUGHLIN, *Circuit Judges,* and BARD, *District Judge.*

OPINION OF THE COURT.

(Filed January 17, 1945.)

BARD, *District Judge.*

This matter is before us upon a petition to issue a "supplemental" or a new mandate to the District Court of the United States for the Middle District of Pennsylvania directing it to "follow the decision" of this court rendered in an appeal from a previous decision of that court and reported in 141 F. 2d 45. The petition requests

that such new mandate direct the district court to compel the United States attorney to disclose to petitioner the names of the witnesses who testified before a grand jury which returned an indictment against petitioner charging him and others with a conspiracy to defraud the United States.

The facts, so far as they are relevant, are that petitioner was arrested on a bench warrant issued by the district court under the indictment against him. He thereupon filed a petition for a writ of habeas corpus, contending that the bench warrant was issued against him without cause and in derogation of his rights under the Fourth Amendment to the Constitution of the United States. On the same day he was freed on bail. A few days later he filed a motion to quash the indictment on the same ground asserted in his petition for writ of habeas corpus.

From the denial of his petition for a writ of habeas corpus petitioner appealed to this court, which dismissed his appeal as moot in view of the fact that the petitioner was not being restrained of his liberty. In our opinion, referred to above, we called attention to the fact that in any event a writ of habeas corpus would not lie to question the sufficiency of an indictment which on its face is within the jurisdiction of the court to which it was returned, and added at page 47: "As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion."

Petitioner subsequently filed with the district court a rule on the United States attorney to show cause why he should not disclose to petitioner or his attorney the names of the witnesses who testified before the grand jury. The court, in a written opinion, dismissed this petition.

At the hearing of the motion to quash the indictment, the court upheld the right of the United States attorney to refuse to disclose the names of the witnesses who testified before the grand jury and dismissed petitioner's motion to quash the indictment.

Petitioner seeks in effect to challenge these rulings as violative of the Fourth Amendment and as in conflict with the language quoted above from our previous opinion in this appeal. Even if petitioner's contention were sound,[1] it would afford no basis for modifying the mandate in accordance with the prayer of the petition. The mandate was issued, upon the dismissal, as moot, of an appeal for the denial of a writ of habeas corpus. In arriving at that decision, the question whether the petitioner was entitled to the names of the witnesses who testified before the grand jury was not involved, and nothing in our opinion was intended to express our views thereon. Accordingly, it is clear that the mandate was properly confined to the decision rendered in the appeal and may not be modified as requested by the petitioner.

Petitioner further contends that he is entitled to the relief sought, under Section 262 of the Judicial Code, 28 U. S. C. A. § 377, which authorizes circuit courts of appeals to "issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The Supreme Court has recently held, however, that the issuance of writs under this section is restricted to cases in which they are issued in aid of the exclusively appellate jurisdiction of the circuit courts of appeals and not as a means of reviewing prematurely rulings made by the district courts within their jurisdiction and reviewable only upon appeal from final judgment, even though this requires the defendant to undergo the

[1] The petitioner has presented no decision contrary to the principles and authorities set forth by Judge Watson, of the District Court, in his opinion. United States v. Potts, 57 F. Supp. 204.

cost and inconvenience of a trial under the challenged indictment. Roche v. Evaporated Milk Association, 319 U. S. 21, 87 L. ed. 1185.

The petition is dismissed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

No. 967

In the Supreme Court of the United States

OCTOBER TERM, 1944

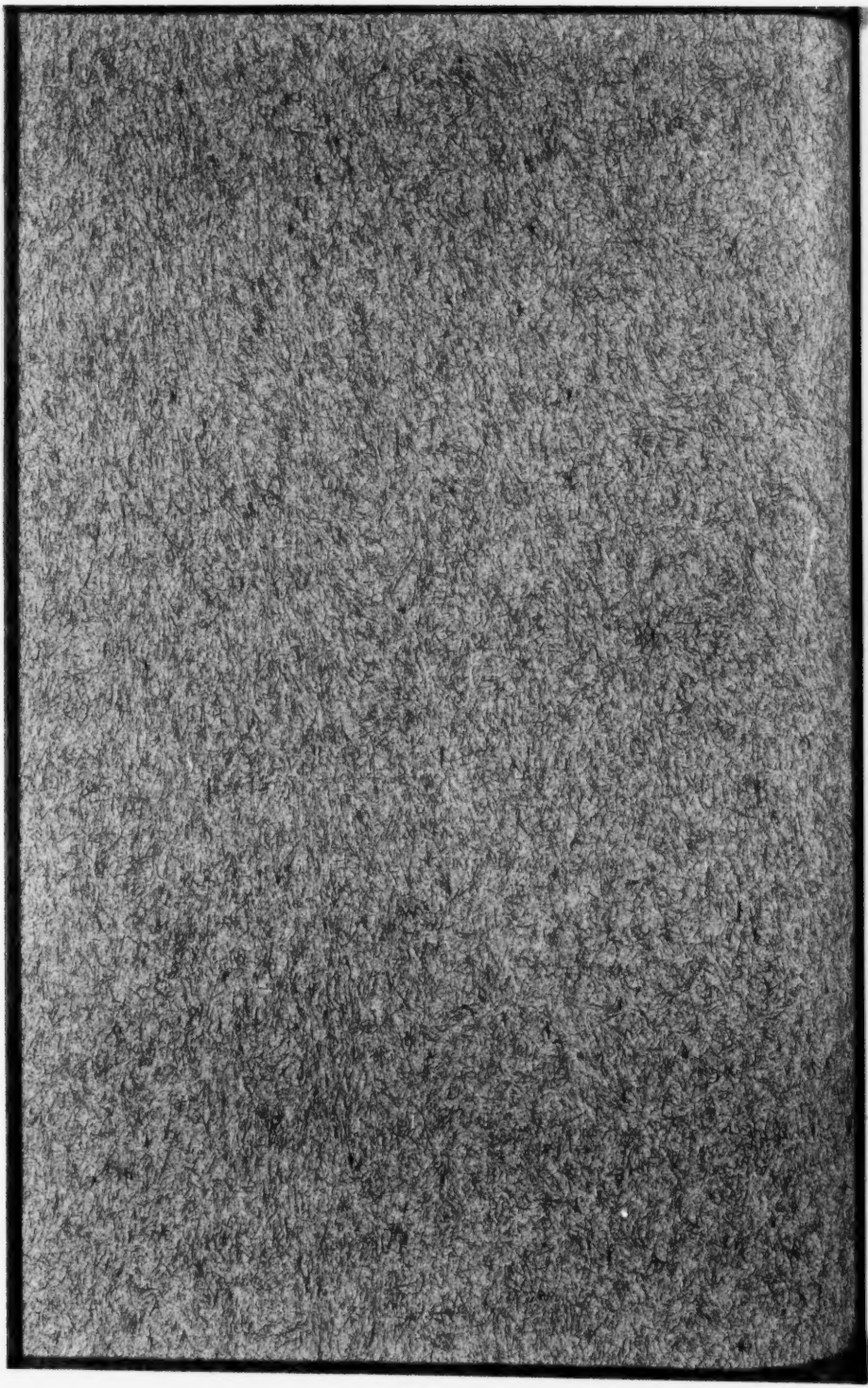
UNITED STATES OF AMERICA, EX REL. THEODORE ROOSEVELT POTTS, PETITIONER,

v.

ROBERT W. KEAN, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF HABEAS CORPUS AND CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 967

UNITED STATES OF AMERICA, EX REL. THEODORE ROOSEVELT POTTS, PETITIONER

v.

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This proceeding is a continuation of the litigation which was before this Court on petition for a writ of certiorari in *United States, ex rel. Potts* v. *Rabb*, No. 763, October Term, 1943, certiorari denied, 322 U. S. 727. The proceedings in the case may be briefly summarized as follows:

On October 20, 1943, petitioner and others were indicted in the United States District Court for the Middle District of Pennsylvania for conspiracy to defraud the United States. Petitioner was arrested on a bench warrant issued by the

district court and he immediately filed a petition for a writ of habeas corpus, alleging that he was being unlawfully restrained in the custody of the respondent, the United States Marshal for the Middle District of Pennsylvania, because a prior indictment returned against him had not been discharged or withdrawn,[1] and for the further reason that no witnesses testified before the October 1943 term grand jury who could or did give legally competent evidence of the charge set forth in the indictment returned by that body. The court denied the petition on the ground that it constituted a collateral attack upon the legal sufficiency of the indictment and that the matters asserted therein should be raised by a motion to quash. Petitioner then pleaded not guilty to the indictment and a few hours later he was released on bond. He then filed a motion to quash the indictment on the ground that no competent evidence was produced before the grand jury and also took an appeal to the circuit court of appeals from the order of the district court denying his application for a writ of habeas corpus. The circuit court of appeals dismissed the appeal as moot, since petitioner had been released from respondent's custody on bond. It also stated that petitioner's rights could be fully protected under his motion to quash; that his

[1] The Government subsequently entered a nolle prosequi to this indictment.

remedy was not by habeas corpus. Thereafter petitioner filed a petition for a writ of certiorari in this Court seeking review of the decision of the circuit court of appeals. The petition for a writ of certiorari was denied. 322 U. S. 727. (See Memorandum for the Respondent in Opposition in that proceeding; Appendix to petition for writ of certiorari in this case, pp. 9–14.)

Shortly thereafter petitioner sought an order from the district court directed to the United States Attorney to show cause "why the names of the witnesses, if any, who testified before the grand jury which found the indictment against your petitioner, should not be disclosed to the petitioner's attorney, for the purpose of permitting the petitioner to show by evidence on the hearing of the motion to quash, that no competent evidence could be given by such witnesses against your petitioner, before the grant jury" (R. 2–3). The order to show cause was issued and a hearing was had (R. 5). Thereafter the court discharged the order to show cause on several grounds (R. 5–7); the motion to quash the indictment was also denied (R. 3).

Petitioner then filed a petition in the circuit court of appeals for a supplemental mandate on the habeas corpus appeal, which would direct the district court "to follow" the prior decision of the circuit court of appeals by compelling the United States Attorney to disclose to petitioner

the names of the witnesses who testified before the grand jury (R. 1–4). The circuit court of appeals dismissed the petition on the ground that the mandate in the habeas corpus proceeding "was issued, upon the dismissal, as moot, of an appeal for [sic] the denial of a writ of habeas corpus. In arriving at that decision, the question whether the petitioner was entitled to the names of the witnesses who testified before the grand jury was not involved, and nothing in our opinion was intended to express our views thereon" (R. 15). The court rejected petitioner's contention that it had power to grant the relief sought under Section 262 of the Judicial Code (28 U. S. C. 377), on the ground that the authority granted by that section does not contemplate the issuance of writs prematurely to review rulings by a district court which may be reviewed on appeal from the final judgment (R. 13–15).

The instant petition for a writ of certiorari seeks review of this last decision of the circuit court of appeals. Petitioner's contention (Pet. 4–8), in essence, is that he is being deprived of a constitutional right because of "mere matters of procedure." This contention is without merit. It is plain that what petitioner is attempting to do is, improperly, to use a habeas corpus proceeding, which, moreover, is moot, to secure an appellate review of a ruling of the district court incident to the denial of a motion to quash the

indictment in advance of the orderly procedure of appeal permitted him in the event he should be convicted. Even if, instead of resorting to habeas corpus, he had attempted in the criminal proceeding, prior to conviction, to appeal the district court's ruling, it is obvious that such premature appellate consideration would not have been permitted. Consequently, the circuit court of appeals was clearly right in denying the relief sought by petitioner.[2]

The petition for certiorari presents no point warranting review by this Court. We therefore respectfully submit that it should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

IRVING S. SHAPIRO,
MAYTE B. GREENE,
Attorneys.

MARCH 1945.

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[2] The circuit court of appeals has sufficiently pointed out in its opinion (R. 15), that the "all writs statute" (Section 262, Judicial Code; 28 U. S. C. 377) upon which petitioner relied in that court, does not authorize the relief requested of it.

U. S. GOVERNMENT PRINTING OFFICE: 1945